APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED FEBRUARY 3, 1999

Kathleen EVANS, as Conservator of Jessica EVANS, a protected person, Plaintiff-Appellant,

v.

LEDERLE LABORATORIES, Link Clinic, and O. Sharma, Defendants-Appellees.

No. 98-1293.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 25, 1998.

Decided Feb. 3, 1999.

* * *

Before CUDAHY, COFFEY and KANNE, Circuit Judges.

CUDAHY, Circuit Judge.

During the first year of her life, Jessica Evans received three doses of a diphtheria, pertussis and tetanus (DPT) vaccine manufactured by Lederle and administered by Sharma, a physician, at the Link Clinic. Several years later, Jessica's mother, Kathleen Evans, filed suit on her behalf seeking to recover damages for injuries allegedly caused by the vaccine. A confusing chronology of litigation ensued culminating in this appeal.

Appendix A

On August 14, 1985, Evans sued the Link Clinic and Sharma in state court. That action was voluntarily dismissed without prejudice to make way for a diversity action filed in the district court on June 8, 1990, naming as defendants Lederle, the Link Clinic and Sharma. On October 1, 1990, Evans filed suit in the Court of Claims seeking an award under the National Childhood Vaccine Injury Act (the "Vaccine Act"), 42 U.S.C. § 300aa-1 et seq. That filing necessitated the voluntary dismissal of the pending diversity action. When the Court of Claims subsequently dismissed the Vaccine Act claim with prejudice, Evans went back to the district court and refiled the diversity action on February 28, 1995. The Link Clinic and Sharma moved to dismiss the claims against them pursuant to the Illinois saving statute which allows a plaintiff just one opportunity to refile an action that has been voluntarily dismissed. See 735 ILCS 5/13-217. The magistrate judge determined that the Illinois rule was preempted by the Vaccine Act and recommended that Evans be allowed to proceed with her action. But the district court rejected the magistrate judge's recommendation on the ground that the Illinois rule was not preempted. Applying the Illinois rule, the court dismissed the Link Clinic and Sharma from the case and subsequently granted Lederle's motion for judgment on the pleadings. We affirm.

I.

We review do novo the district court's decision to dismiss the Link Clinic and Sharma as defendants. A motion to dismiss is granted only if "it appears beyond doubt that the plaintiff can prove no facts sufficient to support [her] claim for relief, and the facts in the complaint are viewed in

the light most favorable to the non-moving party." Flenner v. Sheahan, 107 F.3d 459, 461 (7th Cir.1997); see also City Nat. Bank of Florida v. Checkers, Simon & Rosner, 32 F.3d 277, 281 (7th Cir.1994). A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss. See Flenner, 107 F.3d at 461; Frey v. Bank One, 91 F.3d 45, 46 (7th Cir.1996), cert. denied, 519 U.S. 1113, 117 S.Ct. 954, 136 L.Ed.2d 841 (1997). Thus, we also review the district court's decision to enter judgment on the pleadings in favor of Lederle de novo applying the same principles.

The Vaccine Act provides a no-fault compensation system for individuals harmed by childhood vaccines. The system involves a special procedure whereby a vaccine-injury plaintiff files a petition in the Court of Claims, naming the Secretary of Health and Human Services as respondent, seeking an award to be administered from a fund financed by a tax on vaccines. See 42 U.S.C. § 300aa-11 et seq. Recourse to the Court of Claims is mandatory as a general rule. See 42 U.S.C. § 300aa-11(a)(2)(A). However, a plaintiff, such as Evans, who was already in the throes of civil litigation when the Act came into effect was permitted but was not required to dismiss her civil action and bring a compensation claim under the Act.[1] See Amendola v. Secretary, Dept. Health & Human Serv., 989 F.2d 1180, 1184

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1. The Act provides that such a plaintiff "may, at any time within 2 years after the effective date . . . or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition [in the Court of Claims]." 42 U.S.C. § 300aa-11(a)(5)(A) (as amended in 1989).

(Fed.Cir.1993) (explaining the effect of the Act on pending litigation).

A curious feature of the Act is that filing a petition in the Court of Claims — whether mandatory or optional — does not signal the abandonment of traditional tort rights. Once proceedings in the Court of Claims have run their course, the vaccine-injury plaintiff is allowed to jump ship and initiate or resume a civil action.[2] Congress thus created a bias in favor of the federal compensation scheme by requiring vaccine-injury plaintiffs to exhaust the remedy under the Act before resorting to civil litigation. The result is "a new remedial system that interacts in a complicated way with traditional tort lawsuits." Schafer v. American Cyanamid Co., 20 F.3d 1, 3 (1st Cir.1994). It is in sync with this pas de deux between Vaccine Act claims and conventional lawsuits that we must hop in deciding this appeal.

Evans's original diversity action was pending in the district court when the Vaccine Act came into effect. She exercised her option to proceed under the Act and, having voluntarily dismissed the diversity action, filed a petition in the Court of Claims on October 1, 1990. The petition was dismissed with prejudice pursuant to a joint stipulation.[3]

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2. Specifically, the Act provides that once the Court of Claims has entered judgment, the petitioner must elect either to accept the award and formally abandon his or her tort rights or to reject the award and proceed by way of civil action. See 42 U.S.C. §§ 300aa-11(a)(2)(A)(i) & 300aa-21(a).

3. The fate of the petition is something of a mystery. The stipulation itself calls merely for the dismissal of Evans's claim with

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Evans then elected to return to the district court and filed the present diversity action.[4] She advances two principal arguments — essentially a reiteration of the magistrate judge's view — in support of her bid to maintain that action. First, Evans contends that the Illinois saving statute is preempted by the Vaccine Act and therefore cannot operate to bar her suit. Alternatively, Evans argues that the refiling of her diversity action does not offend the Illinois rule.

II.

In determining whether a federal statute preempts state law, "our ultimate task is to ascertain the intent of Congress."

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prejudice "for reasons addressed during a conference" with a special master. See Appellant's Br. at A-24. Defendants maintain that Evans's petition was time-barred because it should have been filed within two years of the effective date of the Act, October 1, 1988. Evans filed her petition on October 1, 1990, and, according to defendants, missed the deadline by a day. Evans keenly disputes this contention and explains the dismissal as a strategic decision motivated by differences in the type of proof required to sustain her claim in the district court as opposed to the Court of Claims.

4. Lederle questions whether Evans had a right of election in these circumstances. The Act allows a vaccine plaintiff to bring a civil action where the Court of Claims "has issued a judgment . . . on [the] petition." 42 U.S.C. § 300aa-11(a)(2)(A)(i)(I). Lederle contends that the Court of Claims never issued a "judgment" in this case. On its face, this provision does not require a judgment on the merits. Rather, we read the term "judgment" to connote a final disposition of a petition by the Court of Claims. Thus, we take the view that the dismissal of Evans's petition with prejudice triggered her right of election.

American Agric. Movement, Inc. v. Board of Trade, 977 F.2d 1147, 1154 (7th Cir.1992). We have noted that the Act restricts but does not eliminate the exercise of traditional tort rights. In fact, the Act not only recognizes the possibility of civil actions but goes a step further and declares that "[s]tate law shall apply to a civil action brought for damages for a vaccine-related injury or death." 42 U.S.C. § 300aa-22(a). Nevertheless, Evans contends that Congress expressly preempted the Illinois saving statute by virtue of the following provision:

> No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

42 U.S.C. § 300aa-22(e). Evans advocates a broad construction of this provision that would preclude any state rule that operates to prohibit a civil action against a vaccine manufacturer. Since the Illinois saving statute has this effect, Evans asserts that the rule cannot be applied consistent with the Act. The district court rejected this argument and held that § 300aa-22(e) does not extend to state statutes of limitations including the Illinois saving statute. Thus, before addressing whether Congress intended to preempt state statutes of limitations, we must first clarify whether the saving statute's one-refiling rule is properly classified as a rule of limitation.

The Illinois statute of limitations does not expressly bar two or more refilings of a suit. Rather, the one-refiling rule

has developed as a judicial gloss on the saving statute which provides in relevant part:

> Reversal or Dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

735 ILCS 5/13-217.[5] The section is a saving provision "which allows a plaintiff to refile a cause of action if its prior

5. This statutory language was amended prospectively in 1995 by P.A. 89-7 § 15 (eff.Mar. 9, 1995) which the Illinois Supreme Court subsequently held to be unconstitutional in its entirety. See Best v. Taylor Machine Works, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1104 (1997).

disposition was based on the reasons outlined in the statute." Timberlake v. Illini Hosp., 175 Ill.2d 159, 221 Ill.Dec. 831, 676 N.E.2d 634, 636 (1997). But while the one-year grace period is a boon for plaintiffs, Illinois courts have consistently held that the section permits no more than one refiling within that period. See id. ("[section 13-217] was not intended to permit multiple refilings of the same action"); Flesner v. Youngs Development Co., 145 Ill.2d 252, 164 Ill.Dec. 157, 582 N.E.2d 720, 720 (1991) ("We interpret the language of section 13-217 as providing for one and only one refiling regardless of whether the applicable statute of limitations has expired."); Gibellina v. Handley, 127 Ill.2d 122, 129 Ill.Dec. 93, 535 N.E.2d 858, 864 (1989) ("While a [voluntary dismissal] motion in conjunction with section 13-217 may protect the right of a plaintiff to have a decision in the particular case made on the merits of the claim by potentially permitting "two bites of the apple" when the first bite turns sour, the statutory scheme does not allow a third bite."); Gendek v. Jehangir, 119 Ill.2d 338, 116 Ill.Dec. 230, 518 N.E.2d 1051, 1053 (1988) (for the same proposition). The first filing is a reference point for statute of limitations purposes. Thus, the one-refiling rule operates as an integral part of the saving statute which courts have characterized as a rule of limitation. See Reyes v. Court of Claims of State of Illinois, 299 Ill.App.3d 1097, 234 Ill.Dec. 58, 702 N.E.2d 224, 230 (1998) ("This 'savings statute' enumerates the circumstances under which the statute of limitations for certain actions may be extended."); Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 186 (7th Cir.1985) ("The borrowing of a state statute of limitations includes the state's tolling doctrines, which suspend the application of the statute of limitations in prescribed situations."); Cook v. Starling,

104 F.R.D. 468, 470 (N.D.Ill.1985) ("Section 13-217 . . . is part of the chapter titled 'Limitations,' and is part and parcel of Illinois' total statute of limitations scheme . . . ."). And we endorse that characterization for the purposes of the present appeal.

The issue then is whether Congress intended to preempt state statutes of limitations including the Illinois one-refiling rule. Evans argues that the Vaccine Act preempts any state rule — whether substantive or procedural — that bars civil actions. The language of § 300aa-22(e) supports this construction insofar as it provides that "[n]o State may establish or enforce a law which prohibits an individual from bringing a civil action . . . ." However, defendants offer a less expansive reading of the same language that suggests a more modest preemptive effect. They assert that the term "law," as it appears in § 300aa-22(e), refers only to a state's substantive law and does not extend to procedural rules or statutes of limitation. From this perspective, Congress intended to preempt only direct state prohibitions on civil actions that would override the Act's interplay between the federal compensation scheme and traditional tort rights; thus, Congress was not concerned with incidental state rules regulating the time and manner for the bringing of civil actions — even though those rules might restrict or actually bar proceedings. Reasonable minds could differ as to which of the proffered interpretations is correct. Since the plain language of § 300aa-22(e) is susceptible to inconsistent interpretations as to whether the Act preempts state statutes of limitation, we look to other indicia of statutory intent. See United States v. Thomas, 77 F.3d 989, 991 (7th Cir.1996) ("A court may look beyond the plain meaning of a statute

when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention.") (quoting Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 454-55, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989)).

The view that state statutes of limitation are not preempted finds support within the legislative scheme. The Act contemplates the application of state statutes of limitation where a petitioner elects to institute civil proceedings after judgment in the Court of Claims. See 42 U.S.C. §§ 300aa-16(c) (Statutes of limitation are tolled during the pendency of a petition); and 300aa-21(c) (Once a petitioner has elected to file a civil action, any subsequent civil action "shall . . . be brought within the period prescribed by limitations of actions under State law applicable to such civil action."). Indeed, common sense suggests that if state statutes of limitation were preempted — and not replaced by federally prescribed limitations — vaccine-injury plaintiffs would have extraordinary freedom to commence lawsuits at a time and in a manner of their own choosing. This result would be contrary to an important federal purpose underlying the Act, namely, "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." Schafer, 20 F.3d at 4 (citing legislative history); see also Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 565, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) ("strict language . . . does not control, even if the statutory language has a plain meaning, if the application of that language will produce a result demonstrably at odds with the intention of its drafters") (internal quotations and citation omitted).

Appendix A

The legislative history of a statute is significant "when the statute is not clear or when the application of its plain language produces absurd or unjust results." United States v. Shriver, 989 F.2d 898, 901 (7th Cir.1993) (internal quotations and citation omitted). In determining that the Illinois one-refiling rule is not preempted, the district court relied on the House Report which explains § 300aa-22(e) in the following terms:

> State statutes that effectively foreclose individuals from bringing civil actions for vaccine-related injuries or deaths or [sic] preempted by this subsection. The Committee intends this preemption to apply even where a State has established a compensation system as an alternative to filing a civil action. It does not intend, however, to preempt statutes of limitations or other provisions of state law and practice that regulate the time or manner in which civil actions in general may be brought or maintained . . . .

H.R.REP. No. 99-908, at 27 (1986), U.S. Code Cong. & Admin. News 1986 at 6344, 6368. It is hard to imagine legislative history that speaks more directly to the issue and Evans offers no alternative history that would support her interpretation of the Act's preemptive effect.[6] In light of the

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6. In her Brief, Evans did not address this legislative history. Eventually, when pressed on rebuttal at oral argument, Evans's attorney took the position that the meaning of § 300aa-22(e) is plain and that recourse to legislative history is not required. As noted, we disagree.

statutory language, legislative scheme and, in particular, this legislative history, we agree with the district court that the Illinois one-refiling rule is not preempted by the Vaccine Act.

III.

Next we turn to the issue whether the present action is barred by the Illinois one-refiling rule. Statutes of limitations are generally considered part of the forum state's substantive law which federal courts must apply when sitting in diversity. See Guaranty Trust Co. v. York, 326 U.S. 99, 109-10, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). Thus, we have applied the Illinois one-refiling rule in diversity cases. See, e.g., Locke v. Bonello, 965 F.2d 534 (7th Cir. 1992).[7] Moreover, we have previously recognized that the rule allows for a single refiling whether in state court or federal court. See Koffski v. Village of North Barrington, 988 F.2d 41, 43-44 (7th Cir.1993) (plaintiffs were barred from refiling in the district court where their suit had been voluntarily dismissed in state court and then dismissed for lack of subject matter jurisdiction in the district court). In other words, a plaintiff who has filed suit in state court and subsequently commenced diversity proceedings in the district court has exhausted the rule and cannot refile in either court for a second time. Regardless of the forum, Illinois permits a plaintiff just two bites at the apple.

Defendants contend that there has been a total of four filings with respect to Jessica's vaccine-related injuries: (1)

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7. In this regard, we reject Evans's argument that this case is governed by FED.R.CIV. 41, which allows a second refiling.

the state court action against the Link Clinic and Sharma; (2) the initial diversity action in the district court naming all three defendants; (3) the petition with the Court of Claims; and (4) the present diversity action.[8] With respect to the Link Clinic and Sharma, it is undisputed that there were two previous filings — in the state court and the district court, respectively — naming these defendants as parties. On the basis of Koffski, Evans exhausted the Illinois one-refiling rule when she voluntarily dismissed her state court action and commenced proceedings in the district court.

Evans seeks to escape from Koffski's grip by arguing that the Illinois rule is triggered only by a voluntary dismissal whereas she was compelled to seek relief in the Court of Claims. This suggestion is flatly contradicted by the Vaccine Act which expressly gave Evans the option to go to the Court of Claims or to proceed with her pending diversity action. For the purposes of the Illinois one-refiling rule, we see no principled reason to distinguish Evans's decision to forego her diversity action to petition the Court of Claims from her previous decision to abandon the state court in favor of a federal forum. In both instances, the policies underlying the Illinois rule are implicated insofar as Evans made a strategic choice regarding the most advantageous forum for the pursuit of her claims.

Evans also points out that in giving her the option to file a petition in the Court of Claims, the Act provided that her

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8. With respect to the third filing, it is an open question whether filing a petition in the Court of Claims under the Vaccine Act constitutes a filing for the purposes of the Illinois saving statute. But it is not necessary to resolve this question for present purposes.

civil action be "dismissed without prejudice." 42 U.S.C. § 300aa-11(a)(5)(A). From this premise, she infers a Congressional intent to permit the resumption of civil litigation purely as an incentive to plaintiffs like herself to forego pending civil actions in favor of compensation claims under the Act. But Congress gave all vaccine-injury plaintiffs — and not merely those who had civil actions pending — the right to resort to civil litigation after exhausting their remedies in the Court of Claims. Evans's contention is untenable because it fails to take account of the statutory caveat that the commencement or resumption of civil proceedings — as well as their substantive determination — is a matter for state law. See 42 U.S.C. §§ 300aa-21(c) & 300aa-22(a). To put it another way, there is no reason to believe that in deciding not to preempt state statutes of limitations Congress intended to make an exception for plaintiffs who had civil actions pending when the Act came into effect.

In any event, as far as Illinois is concerned, the circumstances in which Evans departed from the district court for the Court of Claims are not material to the application of the one-refiling rule. The Illinois Supreme Court has held that where a cause of action has been dismissed on two occasions, the plaintiff cannot refile regardless of the reason for the second dismissal. See Timberlake, 221 Ill.Dec. 831, 676 N.E.2d at 637 ("Under the statute, the reason a cause of action was originally dismissed is important in determining whether a plaintiff can subsequently refile, but after the case has been filed a second time, the reason for the second dismissal is of no consequence at all. No matter why the second dismissal took place, the statute does not give plaintiff

the right to refile again."). In the present case, it is sufficient that Evans voluntarily dismissed her state court action, that she refiled in the district court and that her case was dismissed for a second time. At least with respect to the Link Clinic and Sharma, the present action constitutes an additional filing that is barred by the Illinois saving statute.

The position with respect to Lederle is more problematic since Lederle was not named as a defendant in the state court action. Evans contends that because Lederle was technically a party only to the original diversity action, the present action constitutes the first refiling against Lederle and, as such, is permitted by the Illinois rule. Lederle counters that its absence from the initial proceeding is a mere technicality. It takes the position that the filings in state and federal court arose out of the same set of facts and therefore comprise the same proceedings for the purposes of the Illinois rule.

The Illinois rule does not differentiate on its face between actions brought against different defendants by the same plaintiff. Evans cites no instance in which a court in Illinois has ignored the rule on this basis. Illinois courts have held that, for the purposes of § 13-217, a complaint is deemed to be refiled where it contains the same cause of action as defined by res judicata principles. See D'Last Corp. v. Ugent, 288 Ill.App.3d 216, 224 Ill.Dec. 30, 681 N.E.2d 12, 16, app. denied, 174 Ill.2d 558, 227 Ill.Dec. 3, 686 N.E.2d 1159 (1997). Res judicata bars a further suit if "the same facts were essential to maintain both actions" or if "a single group of operative facts gives rise to the assertion of relief." Rodgers v. St. Mary's Hosp., 149 Ill.2d 302, 173 Ill.Dec. 642, 597 N.E.2d 616, 621 (1992) (internal quotations and

citations omitted). Here, Evans's claims against all three defendants arise out of the same essential group of operative facts. Insofar as § 13-217 is designed to temper the litigious excesses of plaintiffs, it is reasonable to apply it to multiple refilings of the same action even against additional defendants. Otherwise, a plaintiff could prolong litigation indefinitely merely by failing to join necessary defendants. See Gendek, 116 Ill.Dec. 230, 518 N.E.2d at 1053 ("[Section 13-217] was intended to serve as an aid to the diligent, not a refuge for the negligent.").[9] Thus, we believe that Evans should not be able to maintain this action simply because Lederle was not named as a party in the original state court action.[10]

We are mindful that for Evans the dismissal of this suit so far down the road to recovery may be a bitter pill to swallow. We also recognize that there may be a technical ring to some of the analysis. But to allow Evans to institute fresh proceedings more than 13 years after she first filed suit would invite the evils of uncertain and protracted litigation, which Illinois has chosen to contain. Having voluntarily sought relief before the Court of Claims and having failed in that endeavor, Evans must satisfy the Illinois

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9. Another way of looking at the problem — which also casts it in a light favorable to Lederle — is to say that Lederle should not be penalized for Evans's oversight in failing to include it as a defendant in the original state court action.

10. In light of this conclusion, it is not necessary to consider Lederle's alternative argument, namely that the petition before the Court of Claims constitutes a refiling for the purpose of the Illinois saving statute.

statute of limitations in order to pursue her diversity action in the district court. Unfortunately for Evans, the Illinois Supreme Court has made clear that the saving statute allows for only one refiling. Evans's refiling of the present action was therefore barred.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED OCTOBER 31, 1995

Kathleen EVANS, as Conservator of Jessica Evans, a Protected Person, Plaintiff,

v.

Lederle LABORATORIES, A DIVISION OF AMERICAN CYANAMID COMPANY, a corporation;
Link Clinic, a corporation; and Dr. O. Sharma, Defendants.

No. 95-1341.

United States District Court,
C.D. Illinois.

Oct. 31, 1995.

* * *

ORDER

MIHM, Chief Judge.

Before the Court is the Report and Recommendation of Magistrate Judge David G. Bernthal [# 14] in which Magistrate Judge Bernthal recommends that Defendants Link Clinic and Dr. O. Sharma's Motion to Dismiss [# 4] be denied. This Court has reviewed all of the pleadings submitted in support of and in opposition to the Motion to Dismiss, as well as the Objection to the Report and Recommendation, and for the reasons stated herein REJECTS the Report and Recommendation. The Motion to Dismiss [# 4] is GRANTED.

Appendix B

Background

Jessica Evans (hereinafter "Jessica") is a minor born on May 31, 1978, and a resident of Colorado. Plaintiff, Kathleen Evans (hereinafter "Evans"), filed the Complaint in the case at bar on behalf of Jessica. The Complaint states that this Court's jurisdiction arises from 28 U.S.C. § 1332 and 42 U.S.C. § 300aa-16. Evans and Jessica are residents of the State of Colorado, and the Defendants are not. The amount in controversy exceeds $50,000. Jurisdiction is properly based on 28 U.S.C. § 1332.

Count I of the Complaint alleges that Defendant Lederle Laboratories sold a diphtheria, pertussis, and tetanus (hereinafter "DPT") vaccine to Defendant Link Clinic. Link Clinic is located in Coles County, Illinois. Count I further states that Defendant Dr. O. Sharma, a practicing physician at Link Clinic, administered or caused to be administered a Lederle DPT vaccine to Jessica. Count I specifies that Lederle DPT vaccines were administered to Jessica on the following dates: July 13, 1978, October 10, 1978, and December 11, 1978. Count I maintains that the Lederle DPT vaccine was unreasonably dangerous and that the pertussis element contained in the vaccine caused Jessica injury. In Count II Evans claims that Lederle failed to adequately advise physicians of the risks present in the pertussis component of the vaccine. Count III charges Lederle with negligence. Count IV seeks to hold Defendant Link Clinic and Defendant Dr. Sharma jointly and severally liable for negligence.

A brief review of this case's procedural history will prove useful during the later analysis. On August 14, 1985,

Appendix B

Evans filed a complaint in Cook County, Case No. 85-19357. That case was later transferred to Coles County and renumbered 86-L-57. Defendants Link and Sharma were voluntarily dismissed from 86-L-57 on July 14, 1988. On June 22, 1988, Evans filed an action in Federal District Court, Case No. 88-3191. That action was voluntarily dismissed on August 29, 1990. Thereafter, Evans filed an action in the Court of Claims, Case No. 90-2265V, naming the Secretary of Health and Human Services as the defendant, as is required by 42 U.S.C. § 300aa-12(b). Evans states that no decision was reached on the merits of this action and that the matter was dismissed by the Court of Claims on January 31, 1995.

Discussion

On May 10, 1995, Defendants Link Clinic and Dr. Sharma moved to Dismiss Count IV of the Complaint. In support of the Motion to Dismiss, these Defendants assert that Evans filed three prior actions and that this matter is barred by 735 ILCS 5/13-217. The statute provides, in relevant part:

> 5/13-217. Reversal or dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action

> is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

735 ILCS 5/13-217. Illinois courts refer to this rule as the "one filing rule." See, e.g., Gendek v. Jehangir, 119 Ill.2d 338, 343-44, 116 Ill.Dec. 230, 232, 518 N.E.2d 1051, 1053 (1988) (this provision prohibits multiple refilings of a lawsuit after voluntary dismissal). The Seventh Circuit has held that federal courts sitting in diversity should apply the one filing rule to cases in which the plaintiff first filed in state court, with the second and third filings in federal court. Koffski v. Village of North Barrington, 988 F.2d 41, 44 (7th Cir.1993).

In opposition to the motion to dismiss, Evans asserts that the procedural rules of the State of Illinois, including 735 ILCS 5/13-217 of the Code of Civil Procedure, have no application to a case proceeding in federal court. This Court disagrees. Jurisdiction in the case at bar arises under the diversity statute, 28 U.S.C. § 1332. A federal court sitting in diversity must apply the substantive law of the forum state. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.

1188 (1938); see also S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60 F.3d 305, 309-10 (7th Cir.1995). There are some circumstances in which a state "procedural" rule may be "substantive" in application. S.A. Healy, 60 F.3d at 310 (citations omitted). For example, although a statute of limitations may appear procedural at first blush, it is well settled that statutes of limitation are considered substantive rules for purposes of the Erie doctrine. See Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109-110, 65 S.Ct. 1464, 1469-70, 89 L.Ed. 2079 (1945). Under Illinois' Code of Civil Procedure § 13-217 exists as a savings statute and as such is "part and parcel of Illinois' total statute of limitations." Cook v. Starling, 104 F.R.D. 468, 470 (N.D.Ill.1985). In Abdallah v. Slagg, the court specifically held that "Illinois' saving statute is substantive in nature under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and, thus, a federal court sitting in diversity should apply ¶ 13-217." Abdallah, 803 F.Supp. 220, 222 (N.D.Ill.1992) (citations omitted). This Court finds that as an element of the statute of limitations, and therefore a substantive state rule of law, 735 ILCS 5/13-217 should be applied by a federal court sitting in diversity. See Koffski, supra at 44.

The Magistrate Judge's Report and Recommendation suggests that the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, et seq., (1991 & West Supp.1995),[1]

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1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, as amended 42 U.S.C.A. § 300aa-1, et seq., as amended by the Vaccine and Immunization Amendments of 1990, Pub.L. No. 101-502 (1990).

preempts the effect of 735 ILCS 5/13-217. The Magistrate cites § 300aa-22(e) of the Vaccine Act, which provides:

> No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

42 U.S.C. § 300aa-22(e). This Court respectfully disagrees with the Magistrate's conclusion regarding preemption. Section 300aa-22 of the Vaccine Act provides that "[s]tate law shall apply to all civil actions brought for damages for a vaccine-related injury or death." 42 U.S.C. § 300aa-22(a). Moreover, a brief review of the legislative history surrounding the Vaccine Act clearly establishes that Congress did not intend to preempt State statutes of limitations. The House Report provides, in relevant part, as follows:

> State statutes that effectively foreclose individuals from bringing civil actions from vaccine-related injuries or deaths [are] pre-empted by this subsection. The Committee intends this preemption to apply even where a State has established a compensation system as an alternative to filing a civil action. It does not intend, however, to preempt statutes of limitations or other provisions of state law and practice that regulate the time or manner in which civil actions in general may be brought or maintained.

Appendix B

H.R.Rep. No. 99-908, 99th Cong.2d Sess., reprinted in 1986 U.S.Code Cong. & Admin.News at pp. 6287, 6344, 6368. Therefore, this Court finds that the Vaccine Act in no way preempts State statutes of limitation, including 735 ILCS 5/13-217.

As a final matter, this Court must determine whether 735 ILCS 5/13-217 does, in fact, bar Evans' action against Defendants Link Clinic and Dr. O. Sharma. As noted above, Evans first filed an action in state court in 1985. After a venue transfer, she voluntarily dismissed the case. In June 1988, Evans filed an action in federal district court, and she petitioned for voluntarily dismissal of that case in August 1990. In October 1990, Evans filed an action in the Court of Claims under the Vaccine Act pursuant to 42 U.S.C. § 300aa-11(b). She withdrew that action, as is permitted by § 300aa-21(a) of the Vaccine Act, in January 1995. She filed the case at bar on February 28, 1995.

The Vaccine Act provides that a plaintiff who has a pending civil action for damages arising from a vaccine-related injury or death "may, at any time within 2 years after the effective date of the subpart . . . petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section." 42 U.S.C. § 300aa-11(a)(5)(A) (emphasis added). The effective date of the Vaccine Act was October 1, 1988. Amendola v. Secretary of Dept. of Health and Human Services, 989 F.2d 1180, 1181 (Fed.Cir.1993). Evans' federal court action, filed in June 1988, was pending upon the effective date of the Vaccine Act. Therefore, the Vaccine Act allowed Evans the opportunity to voluntarily dismiss her pending action

and pursue a remedy through the Court of Claims. § 300aa-11(a)(5)(A) & (b)(1). However, nothing within the Vaccine Act indicates that a plaintiff is required to voluntarily dismiss a pending action. In fact, the legislative history clearly indicates that Congress intended plaintiffs to have a choice. The House Report states:

> If a person . . . has a tort action against a manufacturer pending at the time of enactment, he or she may elect to maintain such action or may, within two years of enactment . . . elect to withdraw the action without prejudice and enter the compensation system. If such a person elects to maintain the civil action, he or she is permanently barred from entering the compensation system (emphasis added).

H.R.Rep. No. 99-908, 99th Cong., 2d Sess., pt. 1, at 14, reprinted in U.S.Code Cong. & Admin.News 6344, 6355. This Court finds that the election afforded plaintiffs with a pending action is not mandatory, but discretionary. See, e.g., Amendola v. Secretary of Dept. of Health and Human Services, 1991 WL 43027 (March 14, 1991) (§ 300aa-11(a)(5)(A) gives plaintiffs a choice to elect the federal remedial program or pursue their pending civil action), sustained, 23 Cl.Ct. 621 (July 14, 1991), aff'd, 989 F.2d 1180 (Fed.Cir.1993).

Finding that Evans' voluntary dismissal was a discretionary act has serious ramifications for the case at bar. At the time Evans filed her first federal court petition, June 1988, Illinois' savings statute, 735 ILCS 5/13- 217,

which governed the federal proceedings under the Erie doctrine, would have barred her from filing any further lawsuit on the same claims. Therefore, Evans should not have voluntarily dismissed her federal claim, as she may not file another.

Section 300aa-21(a) of the Vaccine Act permits plaintiffs to make an election which effectively disregards the Claims Court decision. However, § 300aa-21(c) clearly provides that State law controls in determining the applicable limitations rules. As discussed previously, 735 ILCS 5/13-217 is part and parcel of Illinois' limitations rules. Although Congress granted plaintiffs the ability to reject compensation awards, or the lack thereof, the availability of this alternative does not preempt the State limitations rules. See, supra, at 5-6. Therefore, this Court finds Count IV of Evans' Complaint barred by 735 ILCS 5/13-217.

Conclusion

For the reasons stated herein, Magistrate Judge David G. Bernthal's Report and Recommendation [# 14] is REJECTED. The Motion to Dismiss Count IV [# 4] is GRANTED. This matter is referred to Magistrate Judge Robert J. Kauffman.

APPENDIX C — MOTION TO DISMISS WITHOUT PREJUDICE SO AS TO ALLOW PROCEEDING UNDER THE NATIONAL VACCINE INJURY COMPENSATION ACT DATED AUGUST 22, 1990, FILED AUGUST 24, 1990 AND ALLOWED AUGUST 28, 1990

IN THE UNITED STATES CIRCUIT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3191

JESSICA ANN EVANS, etc., et al.,

Plaintiffs,

vs.

LEDERLE LABORATORIES, a Division of American Cyanamid Company, a corporation, et al.,

Defendants.

MOTION TO DISMISS WITHOUT PREJUDICE SO AS TO ALLOW PROCEEDING UNDER THE NATIONAL VACCINE INJURY COMPENSATION ACT

COMES NOW Plaintiff Jessica Ann Evans, a minor, by her mother and next friend, Kathleen Evans, by her attorney, Joseph W. Phebus of the law firm of Phebus, Tummelson, Bryan & Knox, and pursuant to the Federal Rules of Civil Procedure and the National Vaccine Injury Compensation Act, 42 U.S.C., Section 300aa-1, et seq., moves to dismiss

her complaint herein without prejudice so that she may pursue her remedy under the National Vaccine Injury Compensation Program and preserve her right to refile against all defendants herein in the event she should decide not to accept any award or decision of the Court of Claims under said Act, and in support thereof shows unto the Court:

1. That the suit arises out of the administration of DPT vaccination and of a personal injury resulting therefrom to Jessica Evans, a minor.

2. That the manufacturer of the vaccine has been determined to be Lederle Laboratories, a division of American Cyanamid Company, a corporation.

3. That the administrator of the vaccine was Dr. O. Sharma and his employer at the time of the administration, Link Clinic, a corporation.

4. That under the National Vaccine Injury Compensation Program, 42 U.S.C., Section 300aa-1, et seq., the plaintiff has the right to dismiss this proceeding without prejudice as to the defendants herein, to-wit: the administrator of the vaccine and the manufacturer of the vaccine, and thereafter if she does not accept the result of the Court of Claims proceeding under the Act, she may refile her action within the time fixed by said Act against the defendants herein pursuant to 42 U.S.C., Section 300aa-21.

Appendix C

JESSICA ANN EVANS, et al.,
Plaintiffs,
By their Attorneys, PHEBUS,
TUMMELSON, BRYAN & KNOX

BY: s/ Joseph W. Phebus
JOSEPH W. PHEBUS

_x_ ALLOWED
___ DENIED s/ Richard Mills
8/28/90 RICHARD MILLS
U.S. District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 30, 1999

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

April 30, 1999

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.

No. 95 C 1341

Michael M. Mihm, *Judge.*

No. 98-1293

KATHLEEN EVANS, as Conservator of JESSICA EVANS, a protected person,

Plaintiff-Appellant,

v.

Appendix D

LEDERLE LABORATORIES, LINK CLINIC,
and O. SHARMA,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing filed by the plaintiff-appellant, KATHLEEN EVANS, as Conservator of JESSICA EVANS, a protected person, in the above-entitled case, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.